

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of the Federal-State Joint Board on Universal Service)	
)	CC Docket No. 96-45
)	
RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama)	DA 02-3181
)	
)	
Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama)	DA-02-3317
)	
)	
)	

COMMENTS OF THE ALASKA TELEPHONE ASSOCIATION

INTRODUCTION

In accordance with the Federal Communication Commission's ("FCC" or "Commission") Public Notice dated January 10, 2003, the Alaska Telephone Association (collectively "ATA")¹ files these comments in support of the application for review of the Wireline Competition Bureau decisions granting RCC Holdings, Inc. and Cellular South

¹The Alaska Telephone Association is a trade association comprised of rural Alaska local exchange telephone companies. Its active members are Alaska Telephone Company; Arctic Slope Telephone Association Cooperative; Bristol Bay Telephone Cooperative, Inc.; Bush-Tell, Inc.; Copper Valley Telephone Cooperative, Inc.; Cordova Telephone Cooperative; KPU Telecommunications; Matanuska Telephone Association; Nushagak Electric & Telephone Cooperative, Inc.; OTZ Telephone Cooperative; Summit Telephone Company, Inc.; TelAlaska, Inc.; United Utilities, Inc.; and Yukon Telephone Company, Inc.

License, Inc. designation as eligible telecommunication carriers (“ETC”) in the state of Alabama (collectively “Alabama ETC Decisions”).²

The ATA joins the Alabama Rural LECs’ arguments in their Applications for Review of the Alabama ETC Decisions, and, in particular, agrees that (i) the Wireline Competition Bureau should have refrained from making ETC designations in rural service areas until the important universal service fund issues recently referred to the Joint Board are resolved, and (ii) the Wireline Competition Bureau erred in its application of the “public interest” inquiry required under 47 U.S.C. § 214(e) in both of the Alabama ETC Decisions.

There are important reasons for the Commission to reconsider these decisions. The FCC rules do not define the level of scrutiny required by the Congressionally mandated “public interest” inquiry under 47 U.S.C. § 214(e). Consequently, the Alabama ETC Decisions will stand as compelling precedent to all state commissions (including the Regulatory Commission of Alaska) who are currently wrestling with the required scope and depth of the “public interest” standard in the ETC context. The Alabama ETC Decisions, as they now stand, are incorrect; they rest on a false assumption (*i.e.*, multiple ETC designation always results in competition and competition is always

² *RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order (Wireline Comp. Bur., rel. November 27, 2002) (“*RCC Holdings Decision*”); *Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, DA 02-3317, Memorandum Opinion and Order (Wireline Comp. Bur., rel. December 4, 2002) (“*Cellular South Decision*”).

beneficial to the public interest) that renders the public interest inquiry practically superfluous – a result Congress clearly did not intend. This error, if left uncorrected, may further cloud the already murky understanding of state commissions on the application and necessity of the public interest inquiry in rural service areas.

The continued vitality of universal service principles (47 U.S.C. § 254) – and the future health of the fund supporting the maintenance of these ideals in rural America – has become the focus of National concern.³ It is also a concern of particular significance in rural Alaska, as discussed further in Section A below. The Commission itself has acknowledged the rising concern that the entry of competitive ETCs in rural regions could lead to “excessive growth of the [universal service] fund” and the growing consensus that it may be prudent to establish “processing guidelines for ETC applications” as manifested in the recent referral of these issues to the Federal-State Joint Board on Universal Service.⁴

These issues are not without urgency. If multiple ETCs are designated in rural areas throughout the Nation and the fund is ultimately compromised by the policy concerns currently under consideration, the industry will be faced with a host of providers, all whose business plans were based on receiving universal service support, all

³ See, e.g., Stuart Polikoff, *Universal Service in Rural America: A Congressional Mandate at Risk*, developed by the Organization for the Promotion and Advancement of Small Telecommunications Companies, January 2003, available on the Internet at <www.opastco.org> (concluding that “the future of high-cost support for rural carriers is in jeopardy”).

⁴ See *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-46, FCC 02-307, rel. November 8, 2002.

who face diminished economies of scale. The damage would be acute and the unhealthy aftereffects could linger for a long time.

For all of these reasons, it is absolutely vital for the Commission to clarify that the public interest inquiry required by § 214(e) is more than just a “rubber stamp” and to establish a uniform and realistic framework for examining ETC petitions in rural areas. As explained in more detail below, the ATA stresses that the public interest inquiry must at a minimum include:

- (i) an analysis of the actual benefits to consumers of the introduction of a new ETC carrier in a rural area, which analysis must go beyond mere speculation that a new ETC will necessarily introduce a healthy form of competition;
- (ii) an analysis of costs – both monetary and otherwise – of subsidizing two or more carriers in rural and remote areas that have (in the absence of universal service fund support) particularly disadvantageous economies of scale; and
- (iii) a measured balancing of (i) and (ii) based on affirmative evidence provided by the petitioner and the consideration of any countervailing evidence offered by others.

COMMENTS AND ANALYSIS

A. Why the Alabama ETC Decisions are Significant to Alaska Rural LECs

Alaska has the lowest population density of any state in the United States (about 1 person per square mile).⁵ In fact, Alaska is home to eight of the ten least densely populated counties in America. Approximately 80 percent of Alaska communities have fewer than 1,000 people – many fewer than 100. As a result, policies and precedents

⁵ Population density estimates are based on Year 2000 U.S. Census Bureau data, available on the Internet at <http://quickfacts.census.gov/qfd/states/02000.html>.

related to universal service in rural areas have particular significance and critical importance to Alaska.

The importance of universal and reliable telephone service in Alaska cannot be overstated. Alaska is a land of extremes – in area, topography, and climate and in the diffuseness of its population. Most rural Alaskans live in areas inaccessible by roads. Access is available only by air or by boat. The terrain is rugged and temperatures are extreme. Community resources and information sources that are taken for granted in the “lower-48” are practically non-existent throughout much of the state. In light of these conditions, telecommunications service is a critical link to educational, health, and safety resources. But Alaska’s environment also makes the provision of telephone service extremely expensive. Without universal service support, it is clear that many Alaskans would be at risk for vital services.

Alaska’s rural LECs, who comprise the membership of the ATA, provide high quality telephone service in and throughout the remote regions of Alaska, which, while boasting some of the most sublime landscapes in the Nation, also provide some of the greatest challenges with regard to providing and maintaining a high-quality, universally available telephone network. This daunting undertaking has been accomplished by rural LECs based on the promise of a system of support that would allow full cost recovery. The costs for rural LECs to build-out the network have already been expended, and this investment will not change regardless of the number of customers a rural LEC loses to a new ETC or otherwise. As a result, any policy which impacts the level of universal service funding available or places the future of the fund itself at risk is a fundamental

concern to the ATA's rural LECs because, quite simply, its members and its customers have the most to lose.

B. ETC Petitions in Alaska and the Impact of the Alabama ETC Decisions

In the past few years, Alaska has begun to face applications for ETC designation. The first ETC petition to be granted by the Regulatory Commission of Alaska ("RCA") was in Juneau, Fort Wainwright and Fairbanks. By the FCC's definition, these geographic areas are rural areas and by lower-48 standards, are certainly rural. However, most of the areas served by the ATA are decidedly more remote.⁶ More recently, however, several areas served by rural LECs have faced ETC petitions from wireless carriers. ATA members have intervened in these proceedings to express their concerns that the costs associated with subsidizing competition in Alaska's rural areas may far outweigh any perceived benefits from the infusion of a new ETC. ATA members have requested that the RCA adopt specific criteria to consider when deciding whether a second ETC designation in a rural service area is in the public interest. So far, the RCA has not heeded this request, but rather has decided to approach each ETC petitioner on a case-by-case basis.

An ETC petition for a rural study area in Alaska, filed by a wireless carrier, is pending before the RCA. The petitioner is attempting to rely on simple self-certification to support its petition. More troubling, this company is attempting to rely on the

⁶ See *In the Matter of the Request by GCI Communications Corp. d/b/a General Communications, Inc. and d/b/a GCI for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996 for the Fairbanks, Fort Wainwright, and Juneau Areas*, RCA Order No. U-01-11, dated October 28, 2002.

Alabama ETC Decisions for the proposition that self-certification (as opposed to any affirmative evidence) is sufficient to support an ETC petition and that an ETC petitioner bears no burden of proof with regard to the public interest inquiry. If this is the “lesson” to be drawn from the Alabama ETC Decisions then the criteria and considerations set forth at 47 U.S.C. § 214(e) are superfluous – and require no more than checkmarks on a form: “Will you follow § 214? Yes/No.” This is clearly not the law.

C. Why the Alabama ETC Decisions Must Be Reconsidered

1. The Commission’s ETC rules are under review

As an initial matter, the Commission has acknowledged that there are outstanding issues of concern surrounding the designation of new ETCs in rural areas. For example, due to the allocation of high-cost support in relation to the per-line cost of the incumbent (not the actual cost of the new ETC), there is a real potential for “excessive growth” in the universal service fund. In addition, the Commission has asked the Joint Board to consider whether to establish processing guidelines for ETC applications – and, in particular, the analysis required under § 214(e)(2).⁷

The results of this pending review will have a direct impact on the process and outcome of ETC designation proceedings. Caution is required for any pending ETC decisions. The ATA agrees with the Alabama Rural LECs that the Joint Board’s review should be completed prior to new ETC designations in rural areas. This approach is consistent with the universal service principles of competitive neutrality (not favoring

⁷ For reasons discussed below at Section C, the ATA believes that the answer to this question is “yes” and is indeed vital to preserving Congress’ intent in requiring a meaningful public interest inquiry in rural areas.

early ETC applicants over later) and the predictability of the universal service support. *See, generally*, 47 U.S.C. § 254.

2. The Wireline Competition Bureau improperly applied the public interest inquiry

The Telecommunications Act establishes three major areas of inquiry when an ETC application is considered for a rural study area: (1) whether the petitioner offers the services that are supported by federal universal service throughout the applicable service area by using, at least in part, its own facilities;⁸ (2) whether the petitioner adequately advertises the availability of the of supported service through the general media; and, in areas served by a rural telephone company, (3) whether ETC designation is in the public interest. *See* 47 U.S.C. § 214 (e)(1) and (2).

The public interest inquiry is unique to rural service areas. It reflects the reality that the designation of an additional ETC in a rural study area may, in fact, not be in the public interest. This inquiry requires a reasoned cost/benefit analysis (explained in more detail below as Section C) that is based on a factual showing by the petitioner and a consideration of relevant evidence offered by others. If the public interest inquiry is to have any meaning at all, it cannot be based solely on a general presumption or a mechanical recitation of the mantra “competition is good” as the Wireline Competition Bureau has promoted in the Alabama ETC Decisions. The Commission already has

⁸ The FCC has explained that a petitioner’s showing under § 214(e) requires “more than a vague assertion of intent” and instead must include a reasonable demonstration of a carriers “ability and willingness to provide service upon designation.” *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 00-248 (rel. August 10, 2000) (“Declaratory Ruling”) at ¶ 24.

acknowledged, “‘one size does not fit all’ when addressing the needs of rural and small companies.”⁹ Commissioner Adelstein has aptly noted:

We must ensure that the benefits that come from increasing the number of carriers we fund outweigh the burden of increasing contributions for consumers. The public interest also demands that regulators seriously consider whether the market can support more than one carrier with universal service. If not, the new designations shouldn’t be given as a matter of course just because it appears they meet other qualifications.¹⁰

In the Alabama ETC Decisions, the Wireline Competition Bureau approached the public interest inquiry by first looking at the benefits to consumers and then the potential harm to consumers. Finding a benefit in increased competition and no apparent harm to consumers the Bureau concluded that the ETC petitions at issue were in the public interest. While at first blush this may seem like a reasonable approach – a closer look at the Bureau’s reasoning process demonstrates that it is circular and is based on questionable assumptions.

a. *The Bureau misconstrued the actual benefit*

With regard to benefits, the Bureau reasons that “customers in Alabama . . . will benefit from the designation” of a new ETC in the respective rural calling areas at issue. Supporting this finding the Bureau explains that “designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services,

⁹ *In the matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 01-304, rel. Nov. 18, 2001, separate statement of Chairman Michael K. Powell.

¹⁰ Commissioner Jonathan S. Adelstein, Address at the NTCA Annual Meeting and Expo (February 3, 2003).

and new technologies . . . [and] creat[es] incentives to ensure that quality services are available at ‘just, reasonable, and affordable rates.’” *RCC Holdings Decision*, ¶ 23; *Cellular South Decision*, ¶ 25. The Bureau also explained that customers may benefit from broader calling areas offered by wireless carriers.

None of these assertions were apparently supported by any unique or affirmative evidence other than general statements by petitioners as to their beliefs. None of the purported benefits were specific to the applicable Alabama study areas. The Bureau reasoning, consequently, results in a general presumption that a new ETC carrier is a public benefit. The Bureau’s reasoning flows as follows: A new ETC carrier will compete with the incumbent for customers; competition can result in benefits such as increased choice, better rates and new services; therefore a new ETC carrier must benefit the public interest. But this is a false syllogism.

A telephone company may not need to become an ETC to compete with the incumbent. Wireless providers are highly competitive in rural areas. Freed from costs inherent in the creation of a wireline network, the costs of providing wireless service are much different than a wireline carrier. Wireless providers, in fact, already provide service in part or all of many rural study areas. The point being that if wireless providers are already present and competing in part or all of these rural areas, what additional “public interest” is served by ETC designation? ETC designation does not introduce competition, since it is already there; it simply subsidizes the build-out of a redundant network, which is a wasteful expenditure of universal service funds.

Further, the allocation of universal service is not done on a true cost basis. This results in a new ETC getting paid the same amount per line as the incumbent LEC. If a new ETC's actual costs of service are lower for any reason, the subsidy paid to the new ETC results in relative overcompensation – threatening to undermine the incumbent LEC, and potentially leading to the replacement of the incumbent LEC instead of growing competition. Overcompensating a new ETC or favoring one technology over another (wireless over wireline) undermines the principle of “competitive neutrality.” It also demonstrates why, under the current regulatory structure, it is wrong to presume that the benefits of healthy competition will automatically flow from designating a new ETC in a rural area.

Even if one assumes that ETC designation does increase competition, it cannot be presumed that such competition is in the public interest. The purported “competition” resulting from ETC designation is completely synthetic: Two carriers spending universal service funds to build redundant facilities to remote regions where the economies of scale, if left solely to market forces, would not permit even one of the carriers to recover costs. Commissioner Martin has succinctly articulated the concern:

I also note that I have some concerns with the Commission policy . . . of using universal support as a means of creating “competition” in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area,

leading to inefficient or stranded investment and a ballooning universal service fund.¹¹

Thus, the Bureau's major premise that the introduction of a new ETC will automatically increase beneficial competition fails. Designating a new ETC may increase beneficial competition, it may not; but it is a factor that cannot be dismissed by presumption.

b. *The Bureau failed to consider potential harms*

In the Alabama ETC Decisions, the Bureau explained its analysis of potential harm to consumers by stating that Congress established the public interest inquiry out of concern that "consumers in rural areas continue to be adequately served should the incumbent carrier exercise its option to relinquish its ETC designation." *Cellular South*, ¶ 27. The Bureau goes on to reason that since, as part of its § 214(e)(1) analysis, an ETC petitioner must show that it has the ability to offer supported services, that rural consumers need not worry if the incumbent withdraws. Again, this reasoning is flawed. Were it correct, the public interest inquiry (§ 214(e)(2)) would be subsumed by the threshold showing that the carrier was able to provide the nine basic services (§ 214(e)(1)).

In addition, the Bureau overlooks other potential sources of consumer harm:

- * Customers may be harmed if a new ETC's service quality is below that of the incumbent LEC. Adequate service quality is a prerequisite to any of the other potential benefits to consumers that ETC petitioners tout. Subsidizing

¹¹ *In the matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 01-304, rel. Nov. 18, 2001, separate statement of Commissioner Kevin J. Martin.

a second ETC to build-out facilities that provide substandard service is wasteful.¹²

- * Multiple ETCs may squelch innovation or the deployment of advanced services. Delivering new or advanced services to remote areas in high-cost areas is, almost by definition, expensive and burdensome. If there is no guarantee that an ETC will actually capture or maintain a remotely located customer, the incentive to undertake the time and investment is decreased.
- * New wireless ETC's that have "dead spots" in their network may cause a safety risk. The Wireline Competition Bureau dismissed the potential for "dead spots," by saying that their existence has been recognized by the Commission, and service within dead spots is "presumed." *Cellular South* ¶ 18. Customers rely on an ETC carrier's network to be ubiquitous – they are a carrier of last resort; they provide a lifeline to emergency service such as E911. While a carrier need not be providing service throughout a service area prior to ETC designation, in regions where, even after designation and build-out, dead spots are likely if not certain to occur, then dead spots are a concern. Dead spots, of course, are not marked, and a customer using a wireless phone may depend on an adequate signal as they moves about. The customer may not realize that it is in a dead spot until it is too late. Such risk must be considered, particularly in Alaska where rural areas are extremely remote.
- * Subsidizing multiple carriers in a rural region may result in ballooning of the universal service fund beyond manageable levels, harming both incumbents and new ETCs and ultimately, of course, consumers.

In sum, the Wireline Competition Bureau erred in its consideration and application of the public interest inquiry required under § 214(e)(2). The Bureau sought to equate "public interest" with the introduction of a subsidized competitor without a reasoned consideration of relevant factors. The Alabama ETC Decisions must be reconsidered.

¹² Commissioner Adelstein has properly observed that "we shouldn't use universal service to support artificial competition from providers that don't provide the same or better service than what consumers already receive." Commissioner Jonathan S. Adelstein, Address at the NTCA Annual Meeting and Expo (February 3, 2003).

C. The Commission Should Develop a Cost/Benefit Framework for the Public Interest Inquiry

Upon reconsideration, the Alabama Rural LECs strongly urge the Commission to develop a cost/benefit framework to support a reasoned public interest inquiry.

Throughout the country, state commissions have handled the public interest analysis in a variety of manners – some through a thoughtful and deliberate administrative proceeding, others – particularly in regions where an ETC application is uncontested – through a less rigorous process. What has become apparent in these proceedings is that the meaning of “public interest” under § 214(e)(2), and the manner in which the required public interest inquiry is to be performed, lacks clarity and consistency of application. Many of these states will look to the current decision for direction. This is what makes the error in the Wireline Competition Bureau’s reasoning (and its diminution of the public interest inquiry to near oblivion) particularly worrisome; and why the Commission’s reconsideration of the Alabama ETC Decisions may have a national beneficial impact.¹³

Any such framework must be based on the premise, inherent in the Congressional mandate of § 214(e)(2), (6), that the designation of a new ETC in a rural study area may not be in the public interest, even if that carrier has the ability to provide the nine basic services and to advertise the same.

The public interest inquiry involves a balancing of the actual (not presumed) benefits of a second ETC and the costs to consumers of subsidized competition in a high-

¹³ Commissioner Jonathan S. Adelstein, Address at the NTCA Annual Meeting and Expo (February 3, 2003) (“The State Commissioners play a key role in determining if a competitor is eligible for universal service support. They need to take great care in doing this – greater care, in my opinion, than some have in the recent past.”)

cost area. To this end, the public interest analysis must involve an affirmative showing by the ETC petitioner and a consideration of relevant evidence by others on at least the following points:

- * Whether the petitioner has demonstrated a concrete intent to serve. The ability to provide the nine basic services is considered under § 214(e)(1), but the intent to serve is something different. An ETC petitioner that claims that it will provide increased or advanced services to customers must produce a concrete plan for the delivery of those services and/or a date certain on deployment; otherwise, any potential benefit is speculative, conclusory and should not tend to support an ETC application.
- * Whether the petitioner has shown that it will provide service at affordable rates.
- * Whether the petitioner has demonstrated sufficient financial wherewithal to provide supported services throughout the service area.
- * Whether the petitioner has demonstrated that it can provide at least the same quality of service as the ILEC throughout the applicable service area.
- * Whether the petitioner has demonstrated that it can provide consumers with those benefits that it promises in its petition, such as (in *RCC Holding* and *Cellular South Decisions*) increased choices, wider local calling areas, high quality service, and advanced services.
- * Whether designating the petitioner as an ETC will harm consumers through inadequate service quality, unacceptable “dead spots,” disincentives for investment, or otherwise.

This list may not be exhaustive but provides an example of the type of information that is necessary to make a reasoned, supportable public interest determination. While some state commissions may have state-specific considerations they wish to add to any such structure, a Federal baseline would provide invaluable guidance on the level of scrutiny required under § 214(e)(2), (6).

Once the evidence itemized above (and any additional evidence required) is received, the Commission (or the state commission) will have sufficient evidence at its disposal necessary to make two critical determinations in its review of the public interest: (1) whether the benefits that may be derived from granting more than one carrier ETC status exceed the cost of supporting multiple networks and duplicative services; and (2) whether multiple ETC designations will jeopardize “specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”

CONCLUSION

The Wireline Competition Bureau erred in its Alabama ETC Decisions by (i) granting designation in spite of a pending Joint Board review on the very rules that underlie an ETC determination, and (ii) misapplying (largely through neglect) the public interest inquiry required for ETC designation under § 214(e). The proliferation of multiple ETCs in rural areas, and the detrimental impact of this trend on the future stability of high-cost support, have become issues of national significance, making the errors within the Alabama ETC Decisions all the more vital to reconsider and correct. In the balance are universal service principles and public interest factors. These are serious considerations – mandated by statute – that demand the application of a reasoned cost/benefit analysis and careful balancing. The ATA urges the Commission to reconsider the Alabama ETC Decisions, correct the errors therein, and develop a framework for reviewing ETC applications, and in particular the public interest inquiry, based on actual (as opposed to perceived) benefits of multiple ETCs and the potential

harm that results from spending universal service funds to support subsidized competition in rural areas.

Dated this 10th day of February, 2003.

DORSEY & WHITNEY LLP
Attorneys for the Alaska Telephone
Association

ALASKA TELEPHONE ASSOCIATION

By: Heather H. Grahame
Heather H. Grahame

By: James Rowe
James Rowe
Executive Director